

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Application for Transfer of Control of)	WT Docket No. 05-256
WCS Wireless License Subsidiary, LLC from)	(ULS File No. 0002240823)
WCS Wireless, Inc. to XM Satellite Radio)	
Holdings Inc.)	

**CONSOLIDATED OPPOSITION OF
XM SATELLITE RADIO HOLDINGS INC. TO PETITIONS TO DENY**

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Summary

This is a simple transaction involving the merger of XM with WCS Wireless in order to accelerate the deployment of Wireless Communications Service in markets where WCS Wireless holds licenses. The opposition is undoubtedly sincere in not wanting the transaction to occur, but none of the opponents presents any legitimate basis for slowing or stopping it. At bottom, their opposition is not with the transfer of control, but with the deployment of WCS facilities and services. If the opposition had its way, WCS spectrum, still unused eight years after its licensing, would continue to remain undeveloped. Rather than encourage these dilatory tactics, the Bureau should promptly dismiss the petitions to deny and approve the transaction, so that service to the public can begin expeditiously.

The opponents' substantive claims are entirely irrelevant to the transaction. Sirius' complaint about intermodulation interference to its satellite radio receivers from WCS transmitters that may be collocated with SDARS repeaters ignores that such collocation is permitted and likely (given the limited number of transmit sites in many markets), regardless of whether this transaction occurs. Indeed, Sirius could suffer the same intermodulation effects from WCS transmitters in one WCS spectrum block collocated with WCS transmitters in another WCS spectrum block, independent of *any* SDARS operations. As Sirius itself has recognized in the context of the repeater negotiations, intermodulation interference is a well-recognized issue that wireless engineers routinely anticipate and resolve in the design of their networks and equipment; it is not a reason to impede this transaction.

NAB tries to slow or stop the transaction by insisting that the Commission first examine the impact of subscription mobile multimedia services on the financial health of the radio broadcasting industry and, presumably, deny the transfer of control application if it determines that these services threaten the viability of broadcasting. This argument is absurd for any

number of reasons. First, NAB fails to show any connection between the transfer of control and its concern about the impact of these new services on broadcasting. WCS Wireless could deploy the same facilities and offer the same services (albeit probably in a less expeditious fashion), including in a joint venture with XM, without any transfer of control. Second, NAB fails to address that development of subscription mobile multimedia services is being undertaken by many other companies in many other frequency bands, including many companies that have far more resources than XM or WCS Wireless. Third, NAB fails utterly to show that the new subscription mobile multimedia services XM intends to provide threaten the viability of terrestrial broadcasters, let alone that they are not good for consumers or that they do not serve the public interest. Relative to these new services, the radio broadcast industry remains healthy and dominant by any reasonable measure, and, if anything, may be motivated by these new services to expedite the roll-out of digital radio. To the extent these new subscription mobile multimedia services compete with terrestrial broadcasters, which will certainly be limited by the fact that they will be *pay* services requiring the purchase of a specialized receiver, the Commission has recognized repeatedly that competition is a good thing.

NAB's petition also shows a misunderstanding of the important distinctions the Commission makes between broadcast service and non-broadcast service, and between SDARS and WCS. As to the first distinction, by definition established in long-standing court and Commission precedent, broadcast service is a free service, available to any consumer with the necessary receive equipment. A subscription service, limited to paying customers, such as that XM intends to provide in the WCS band, is not a broadcast service. In 1997, the Commission gave the SDARS licensees the option of being broadcasters or providers of subscription services and both opted to offer subscription services. Thus, when NAB complains that XM will violate

the Commission's rules by using the WCS licenses to offer terrestrial broadcast services, it is doubly wrong, both because XM does not intend to offer broadcast services and because the WCS rules clearly permit XM (or WCS Wireless) to offer a broad range of subscription services including the kind described in the transfer application. If the Bureau were to decide in this proceeding to restrict XM from providing subscription multimedia services, it would have far-reaching implications for all WCS licensees as well as licensees in other bands already offering or planning to offer subscription multimedia services in bands where there is no broadcast allocation, including the Personal Communications Services ("PCS"), cellular, Advanced Wireless Services ("AWS"), 1670-1675 MHz band, and the Broadband Radio Service ("BRS") bands. As to the second distinction, while SDARS is permitted in the WCS frequencies (subject to certain limitations), the WCS allocation is not limited to SDARS, and XM does not propose to provide SDARS in the WCS band at this time. If XM chooses to take the necessary steps to provide SDARS to consumers using this spectrum, the Commission's rules are clear that the service would be subject to the Commission's SDARS rules. Thus, NAB's request that the Commission impose conditions on XM's operations in the band related to the operation of broadcast service or SDARS service, both of which are already restricted, would be misplaced and unnecessary. In any event, imposing conditions on the transfer would fly in the face of concerted efforts by both Congress and the Commission to promote entry by service providers into new markets unimpeded by unnecessary regulations tied to the entrant's traditional business. Such line-of-business restrictions have been rejected by Congress and the Commission as an over-regulatory tool of a bygone era.

The WCA petition is also completely misplaced. Its complaint concerns a separate waiver proceeding, in which WCS Wireless has asked that it be permitted to measure the output

power of its in-band transmissions in terms of the average power rather than the peak power.

Grant of the waiver would permit WCS Wireless (or XM) to use new digital waveforms to cover larger areas without increasing the potential for interference to users of adjacent channels. WCA has misunderstood the scope of the waiver request to include an increase in out-of-band emissions. In any event, the waiver proceeding is entirely independent of the transfer of control proceeding.

The opponents' procedural claims are similarly misplaced. The application provides ample information for the Bureau to make a decision. The additional information the opponents seek, including Sirius' request for information regarding XM's specific deployment plans, is not pertinent to any legitimate transfer of control issue and would only cause unnecessary delay. The public notice was typical of similar transactions and the transaction presents no "new or novel" issues requiring the Bureau to defer action to the full Commission, and cause further unnecessary delay.

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**CONSOLIDATED OPPOSITION OF
XM SATELLITE RADIO HOLDINGS INC. TO PETITIONS TO DENY**

XM Satellite Radio Holdings Inc. (“XM”) hereby files this Consolidated Opposition to the Petitions to Deny the above-referenced application to transfer certain Wireless Communications Service (“WCS”) licenses from WCS Wireless, Inc. (“WCS Wireless”) to XM.¹ For the reasons discussed herein, the Bureau should facilitate the deployment of new services in the long-fallow WCS band by promptly approving the transfer application.

Background

Applicants. WCS Wireless and XM are pioneers and innovators in developing use of their respective licensed frequency bands. As discussed more fully in its own opposition being filed today, WCS Wireless represents the merger of several parties, some of which were early WCS licensees, and all of which have tremendous experience in the development of new wireless services.² XM, of course, is the leading provider of satellite radio service in the world today and one of the great American, high-tech success stories of this decade. XM was one of

¹ See Application of Application for Transfer of Control of WCS Wireless License Subsidiary, LLC from WCS Wireless, Inc. to XM Satellite Radio Holdings Inc., File No. 0002240823 (filed July 15, 2005) (“Application”). XM and WCS Wireless are referred to collectively as the “Applicants.”

² Among other things, WCS Wireless has sought a waiver of the Commission’s rules to operate WCS base stations pursuant to an average rather than a peak power specification. See *Wireless Telecommunications Bureau Seeks Comment on WCS Wireless, LLC Request for Waiver of Section 27.50(a), Public Notice*, DA 05-1662 (June 15, 2005).

two winning bidders in the satellite radio auction held in April 1997. Since its licensing, XM has spent over three billions dollars constructing and operating multiple satellites, deploying in-band terrestrial repeaters in some markets to fill gaps in satellite coverage, and developing and designing consumer receivers that allow for excellent reception in a challenging interference environment with adjacent band terrestrial facilities. As of June 2005, XM had more than 4.4 million subscribers.

Proposed transaction. With the proposed transfer of WCS Wireless' licenses to XM, the Applicants seek to accelerate development of WCS frequencies that have long been fallow. The services contemplated at this point include subscription mobile multimedia services similar to those being provided or under development by some of the country's major communications companies, such as Cingular,³ CrownCastle,⁴ Motorola,⁵ Qualcomm,⁶ Sprint,⁷ and Verizon

³ https://www.cingular.com/media/media_net (noting that its subscribers have access to local movie times, traffic, and weather). In addition, MobiTV is available on the Cingular network, which provides subscribers with access to radio and television programming (<http://www.mobitv.com/>).

⁴ See *Samsung and Crown Castle Announce DVB-H Mobile Media Collaboration at CTIA* (available at <http://investor.crowncastle.com/ReleaseDetail.cfm?ReleaseID=157843>) (March 14, 2005) ("Crown Castle Mobile Media has an unencumbered nationwide US spectrum license and anticipates building a DVB-H network across the US to transmit high-quality, multi-channel live and streaming digital television for reception on suitably-equipped cell phones.").

⁵ Motorola is testing a new service called iRadio, a digital music service that uses cell phones to link consumers' home PCs with their car stereos. See Colin Gibbs, *Motorola's iRadio to Test in DC, LA*, RCR Wireless News, June 20, 2005, at 3.

⁶ <http://www.qualcomm.com/mediaflo/index.shtml>; *MediaFLO USA Overview* (available at: http://www.qualcomm.com/mediaflo/news/pdf/mediaflousa_brochure.pdf) ("Wireless consumers may easily surf 50 to 100 national and local content channels on mobile handsets.").

⁷ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, FCC 05-13 (February 4, 2005), at ¶ 107 (noting that "Sprint is now offering two different video services on its mobile telephones. For about \$10 a month, Sprint customers can receive either real-time programming from a variety of networks on 'MobiTV' or, specially produced short clips from major networks on the 'Sprint TV' service."); *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Ninth Report*, 19 FCC Rcd 20597, ¶ 154 (September 28, 2004) ("In May 2004,

Wireless,⁸ as well as countless operators in both licensed and unlicensed frequency bands which will soon offer internet radio to mobile receivers.⁹ Foreign operators such as Nokia are also in the process of developing new and innovative subscription mobile multimedia services.¹⁰

The WCS Allocation. In establishing WCS, the Commission explained that WCS licensees are permitted “to provide a variety or combination of services,” including but not limited to “interactive, high-speed, broadband data services, such as wireless Internet access; return links for interactive cable and broadcasting service; mobile data; satellite DARS; fixed terrestrial use; new and innovative services; radiolocation; educational applications; and wireless local loop.”¹¹ As Gerald Vaughan, former chief of the Commission’s auctions division stated to

it was announced that a Major League Baseball highlights channel and an audio channel carrying broadcasts of all New York Yankees games would be added to Sprint PCS’s existing MobiTV package, and that an additional package of 30 game-audio channels, each playing the home broadcasts for a single team, would be offered.”); <http://www1.sprintpcs.com/explore/ueContent.jsp?scTopic=multimedia>.

⁸ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry*, MB Docket No. 05-255, FCC 05-155 (August 12, 2005), at ¶ 84 (noting that Verizon Wireless provides streaming video to mobile handsets via its CDMA EV-DO wireless network); *Press Release, On-Demand In the Palm of Your Hand: Verizon Wireless Launches “VCAST” – Nation’s First and Only Consumer 3G Multimedia Service* (January 7, 2005) (available at <http://news.vzw.com/news/2005/01/pr2005-01-07.html>) (noting that subscribers will have access to news, weather, and sports information, among other types of programming).

⁹ See *David Colker, Internet Radio Poised for a Tune-Around*, Los Angeles Times (February 7, 2005) (quoting Julie Coppernoll, director of marketing for Intel Corp.’s wireless group, as stating “If you were driving around a city covered by a WiMax cloud, you could theoretically get Internet radio in the car, everywhere”); *id.* (quoting Laura Behrens, an analyst with Gartner Inc., as stating that people will not care if radio “comes from a station with call letters, direct from satellite or streamed from some guy in a basement in another continent. For radio, that’s the world to come”); *Brad Smith, Wireless to the Max*, Wireless Week (February 1, 2005) (“Among the uses the Intel executive sees for WiMAX in the future are providing mobile personal streaming radio from thousands of Internet radio stations.”).

¹⁰ See *Wireless*, Communications Daily, August 8, 2005, at 9 (discussing emergence of mobile TV service to mobile phones in Finland).

¹¹ See *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service, Report and Order*, 12 FCC Rcd 10785, ¶ 27 (1997).

potential bidders on WCS spectrum, “Here is some spectrum. Do whatever you want with it, with a few very minor exceptions. Our opinions mean nothing 15 seconds after you buy the spectrum.”¹²

Despite the licensing of WCS systems over eight years ago, there are little or no deployments underway by any of the other licensees.¹³ The WCS rules provide that licenses will not be renewed unless licensees demonstrate their provision of substantial service by the end of the license term (July 2007). *See* 47 C.F.R. § 27.14.

Petitions to Deny. The transfer application was opposed by three parties: Sirius Satellite Radio Inc. (“Sirius”), the National Association of Broadcasters (“NAB”), and the Wireless Communications Association International, Inc. (“WCA”).¹⁴

Sirius, the other provider of satellite radio in the United States, claims that XM’s operation of WCS transmitters will cause interference to Sirius receivers when those transmitters are collocated with XM’s SDARS terrestrial repeaters and that XM’s operation of WCS transmitters in the WCS C Block, adjacent to Sirius’ spectrum, will overload Sirius’ receivers. *See* Sirius Petition at 4-6. Sirius also argues that XM’s status as a WCS licensee will unfairly prejudice the ongoing negotiations between the satellite radio operators and the WCS licensees regarding final technical rules to govern SDARS terrestrial repeaters. *Id.* at 7. Sirius requests

¹² Bennett Z. Kobb, *Wireless Spectrum Finder, Telecommunications, Government, and Scientific Radio Frequency Allocations in the U.S. 20 MHz-300 GHz*, at 239 (2001).

¹³ *See* Blair Levin et al, *NAB Attacks XM-WCS Deal, But Faces Uphill Fight to Stop Local Content*, Legg Mason (July 25, 2005) (noting that Bal/Rivgam announced a modest WCS launch in Bristol County, MA, in March 2005 and BellSouth plans a commercial wireless broadband launch in August 2005 in parts of Athens, GA, followed by similar efforts in Florida cities later this year).

¹⁴ *See* National Association of Broadcasters, Petition to Deny, File No. 0002240823 (August 3, 2005) (“NAB Petition”); Sirius Satellite Radio Inc., Petition to Deny, File No. 0002240823 (August 3, 2005) (“Sirius Petition”); Wireless Communications Association International Inc., Petition to Deny, File No. 0002240823 (August 3, 2005) (“WCA Petition”).

that the Bureau hold the transfer application in abeyance pending the conclusion of these negotiations. *Id.*

NAB opposes the application on the grounds that XM's offering of subscription-based mobile multimedia services using WCS frequencies will threaten the viability of terrestrial broadcasting. Without presenting any evidence of such a threat or of how XM is the sole cause of such a threat as opposed to every other company that can offer subscription mobile multimedia services, NAB asks the Bureau to impose unspecified conditions on the transfer to protect the viability of terrestrial broadcasting. *See* NAB Petition at 3. NAB's filing is consistent with its past efforts to slow or hinder the deployment of satellite radio. NAB has opposed the allocation of frequencies for satellite radio,¹⁵ the authorization of SDARS terrestrial repeaters,¹⁶ and the introduction of nationally-transmitted traffic and weather channels by the satellite radio operators.¹⁷ Historically, NAB has used the FCC's processes to oppose virtually

¹⁵ *See, e.g.*, Comments of NAB, RM-7400 (August 20, 1990); Comments of NAB, File Nos. 49/50-DSS-P/LA-90 et al. (November 20, 1990); NAB, Petition to Deny Application of Satellite CD Radio, Inc. File Nos. 49/50-DSS-P/LA-90 et al. (November 13, 1992); Comments of NAB, GEN Docket No. 90-357 (January 29, 1993); Letter from Edward O. Fritts, NAB, to Hon. Reed E. Hundt, Chairman, FCC, GEN Docket No. 90-357 (May 3, 1995).

¹⁶ *See, e.g.*, Comments of NAB, IB Docket No. 95-91 (June 13, 1997); Reply Comments of NAB, IB Docket No. 95-91 (June 27, 1997); Response of NAB, IB Docket No. 95-91 (January 9, 1998).

¹⁷ *See* National Association of Broadcasters, Petition for Declaratory Ruling, MB 04-160 (April 14, 2004) (seeking to ban XM and Sirius from, among other things, offering "locally oriented" services on nationally distributed channels). In the face of heavy opposition from interests ranging from satellite radio consumers to consumer electronics manufacturers to the United States Department of Transportation, NAB eventually withdrew this Petition. *See* Comments of the Consumer Electronics Association, MM Docket No. 04-160 (June 4, 2004); Reply Comments of the United States Department of Transportation, MM Docket No. 04-160 (June 21, 2004) ("The Department, the Commission, and travelers everywhere know that there is a strong public interest in making travel-related information readily available. They know as well that the value of such information, even when pertinent to particular metropolitan areas, is not constrained to those living and working within the boundaries of those communities. The NAB Petition seeks to limit dissemination of this information, and thus its benefits, to those within the

any new service that may compete with its membership. In addition to SDARS, NAB has opposed FM radio, cable television, and Direct Broadcast Satellite.¹⁸ As a recent article in Forbes magazine explains:

For decades the radio industry has crushed incipient competitors by wielding raw political muscle and arguments that are at once apocalyptic and apocryphal. Radio station owners, who formed the National Association of Broadcasters in 1923, have won laws and regulations that have banned, crippled or massively delayed every major new competitive technology since the first threat emerged in 1934: FM radio.¹⁹

In its Petition, NAB is now expanding its opposition to include subscription mobile multimedia services.

WCA, a trade association purporting to represent the wireless broadband industry, uses its Petition to address the pending waiver request filed by WCS Wireless. The waiver asks for authority to measure the output power of its in-band transmissions in terms of the average power rather than the peak power. WCA argues that interested parties did not receive sufficient notice that transfer of the WCS licenses from WCS Wireless to XM would include the transfer of the pending waiver application. *See* WCA Petition at 3. Moreover, WCA argues that XM will need to make its own case for a waiver. *See id.* at 3, 5.

reach of particular media. DOT opposes such a restriction, and we ask the Commission to deny the Petition.”).

¹⁸ *See, e.g.*, Merrill Brown, *NAB Tactics on Satellite TV Scored*, Washington Post, December 21, 1981 (noting NAB’s opposition to DBS); Ernest Holsendolph, *U.S. Backs Construction of Satellite-to-Home TV*, N.Y. Times, September 23, 1982 (noting NAB’s opposition to DBS); Tom Shales, *Cable Breaks; The Cable TV Ruling; And Commercial Shakes*, Washington Post, July 24, 1980 (noting NAB’s opposition to cable); Patrick R. Parsons & Robert M. Frieden, *The Cable and Satellite Television Industries* (1998), at 49 (noting broadcast industry’s use of economic harm argument in opposition to cable).

¹⁹ *See* Scott Woolley, *Broadcast Bullies*, Forbes, September 6, 2004.

Discussion

I. THE SUBSTANTIVE ISSUES RAISED BY THE PETITIONERS ARE NOT RELEVANT TO THE TRANSFER APPLICATION

The substantive issues raised by the petitioners are not germane to the narrow issue before the Bureau: whether the transfer of control of these licenses is in the public interest.²⁰ As discussed below, the petitioners ignore that there is nothing unique about XM's use of WCS frequencies compared with what WCS Wireless or any other WCS licensee might do with the same frequencies.

A. Sirius' Interference Concerns Are Not Unique to XM's Operation of WCS Facilities and, in any Event, Are Unfounded

Sirius claims that XM's use of WCS frequencies will cause interference to its satellite radio receivers, but it completely fails to explain how XM's proposed use of WCS frequencies would be different than the use of those same frequencies by any other entity.²¹ XM will operate in accordance with the WCS rules, as would any other WCS operator.²² The fact that XM rather

²⁰ NAB has claimed that WCS Wireless is engaging in trafficking, but the Commission has explained that trafficking concerns do not apply to licenses that were auctioned, such as the licenses being transferred here. *See* NAB Petition at 6-8; *Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, 15 FCC Rcd 17414, ¶ 41 (2000). Moreover, WCS Wireless in its Opposition has refuted NAB's claim. *See* WCS Wireless, Opposition, File No. 0002240823 (August 17, 2005).

²¹ For this reason, Sirius' failure to establish a causal link between the transfer and the harm it alleges means it does not have standing to file its Petition to Deny. *See, e.g., Minnesota PCS Limited Partnership, Order*, 17 FCC Rcd 126, 128, ¶6 (Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, 2002).

²² Both WCS Wireless and XM support grant of a waiver to operate WCS base stations at an average rather than a peak power specification. *See* WCS Wireless, Amended Request for Waiver, DA 05-1662 (May 16, 2005); Joint Comments of Sirius and XM, DA 05-1662 (July 5, 2005); XM, Reply, DA 05-1662 (July 15, 2005). That waiver request, however, is completely independent from the instant application for transfer of control. Moreover, Sirius has not opposed this waiver request. *See* Joint Comments of Sirius and XM, DA 05-1662 (July 5, 2005). In fact, Sirius has noted that the "average power definition . . . is preferred from both an operational and a verification measurement standpoint." *Id.* at 2. In fact, operation of WCS base stations at an average rather than a peak power specification will reduce the number of WCS

than WCS Wireless will be the licensee for these frequencies is irrelevant to any analysis of potential interference. For instance, WCS Wireless, instead of transferring control to XM, could have entered into a joint venture with XM and deployed its own WCS facilities (albeit probably in a less expeditious fashion), operating in the same WCS spectrum blocks where XM would operate and collocating some or all of them with XM SDARS repeaters – all within the existing rules and all creating the same interference environment that Sirius now claims is so problematic. Indeed, even without any connection to XM, it is virtually inevitable that many WCS transmitters when they are deployed will be colocated with XM’s repeaters or other WCS transmitters,²³ if only because there are relatively few sites for wireless base stations in urban areas and many of them are shared by multiple operators. Similarly, Sirius’ concerns about overload interference from WCS C Block operations by XM ignore that WCS C Block operations are inevitable, whether by XM or some other licensee. Indeed, the fact that the Commission established a July 2007 “substantial service” deadline suggests that the Commission itself has found the timely commencement of operations in this block to be in the public interest, and that it is prepared to relicense the spectrum if the current licensees do not begin operations in the near future.

Sirius claims that it never expected WCS licensees to deploy substantial numbers of base stations because the WCS rules are so restrictive and the auction prices were so low. *See* Sirius Petition at 2-3. This miscalculation, however, can hardly be a basis for challenging a transaction

base stations needed to cover the same geographic area, thereby mitigating any potential interference Sirius may claim.

²³ As discussed in the attached Technical Appendix, the same intermodulation concerns will arise if an existing WCS licensee constructs a system using a combination of two or more A, B, C, or D block licenses in a given market, regardless of whether XM operates SDARS terrestrial repeaters in that market. XM would also be subject to this same type of interference, including when WCS licensees collocate with Sirius repeaters.

that will provide more resources for the development of WCS without changing the rules for that deployment.

Sirius cannot claim that any of this is new. Sirius was active in the WCS rulemaking. At no time did Sirius raise these concerns or propose any restriction on the collocation of WCS transmitters with either SDARS repeaters or other WCS transmitters. To the contrary, Sirius has not been bashful about chiding the WCS licensees for failing to design their systems to account for the potential for interference from intermodulation and overload.²⁴ Sirius is also on record supporting parity between SDARS and WCS licensees in being permitted to deploy an unlimited number of transmitters at no more than 2 kW EIRP.²⁵ The fact is that intermodulation and overload interference are common issues in wireless system design and, just as commonly, are routinely resolved by system engineers, through coordination with other operators, proper

²⁴ See Sirius, Comments, IB Docket No. 95-91, Dec. 14, 2001, at 23-24 (“[T]he WCS licensees have been on notice since 1990 that the use of complementary terrestrial repeaters would be an important part of the satellite DARS systems, and they have assumed the risk that such repeaters would interfere with their operations when they acquired their spectrum rights and designed their systems.”); Sirius, Reply Comments, File No. SAT-STA-20010724-00064 (August 31, 2001), at 2 (“WCS equipment has been designed to accommodate WCS operations, without properly recognizing satellite DARS operations. Rather than penalize satellite DARS, the FCC should require WCS licensees to redesign their equipment to reject authorized transmissions in the satellite DARS band.”); Sirius, Ex Parte, IB Docket No. 95-91 (April 23, 2001), at 3 (“Having failed to employ the good engineering practice required by the rules to avoid WCS-to-WCS interference, the WCS licensees now seek to limit interference into their poorly designed equipment from satellite DARS terrestrial repeaters. Because interference from adjacent terrestrial repeaters should have – and easily could have – been avoided by the WCS licensees through compliance with existing rules, the Commission should not shift the consequences of this engineering mistake to the satellite DARS licensees by restricting terrestrial repeaters unreasonably.”).

²⁵ See Sirius, Comments, IB Docket No. 95-91, Dec. 14, 2001, at 23 (“Sirius supports the FCC’s tentative conclusion not to restrict the satellite DARS licensees’ deployment of terrestrial repeaters operating at or below 2 kW. The satellite DARS licensees should have the same opportunity to operate unlimited numbers of these low power terrestrial repeaters as adjacent WCS spectrum licensees.”).

equipment design, and, to the extent necessary, deployment of additional transmitters.²⁶ XM has planned for this eventuality to the extent practical and believes that the interference impact of WCS deployments should be manageable.

B. NAB's Challenge to XM's Provision of Subscription Mobile Multimedia Services is Misplaced

NAB raises concerns regarding alleged increased competition from emerging subscription mobile multimedia services that already exist today and will continue to exist regardless of the identity of the WCS licensee.²⁷ The same subscription mobile multimedia services XM is contemplating providing could be provided by any other WCS licensee and in any other frequency band with a commercial Mobile or Fixed allocation. Moreover, NAB fails

²⁶ See Joint Sirius and XM Ex Parte, IB Docket No. 95-91, April 5, 2002, at 4 (“In the repeater proceeding, our position is that the operation of satellite radio repeaters as deployed will not cause harmful interference to properly designed WCS receivers . . . [I]t is practical in [this] case for the receiver to be built with filters or automatic gain control to prevent overload or intermodulation.”); Sirius, *Ex Parte*, IB Docket No. 95-91, Feb. 15, 2002, at 2 (“Both of the satellite DARS licensees have already invested significant time and money engineering their own systems and receivers to prevent such desensitization. This was a rational engineering decision undertaken to eliminate unwanted interference from each other.”); Joint Sirius and XM *Ex Parte*, IB Docket No. 95-91, March 18, 2002, at 2 (“The fact that Sirius and XM Radio built receivers with RF AGC [automatic gain control] (in the consumer receivers) demonstrates that the engineering solution Sirius and XM Radio advocate works. This is because each company carefully designed consumer equipment (including RF AGC) in order to reduce receiver susceptibility from satellite DARS terrestrial transmissions by the other DARS licensee in adjacent spectrum. Equipped with RF AGC, the several thousand currently deployed DARS receivers work with adjacent 40 kW terrestrial repeaters and are available at economical prices. BellSouth fails to explain how Sirius and XM Radio can successfully operate in adjacent spectrum (just as close as the WCS C and D blocks) while WCS cannot.”); Sirius, Reply Comments, IB Docket No. 95-91, Dec. 21, 2001, at 7 (“[T]he record is already replete with evidence that interference from neighboring WCS receivers [sic] far exceeds the minimal threat of IMD from DARS higher power repeaters. Notably, XM’s Supplement to White Paper makes clear that WCS licensees’ same engineering solutions that minimize the potential for blanketing interference – equipment redesign or filters – also eliminate any potential IMD interference from satellite DARS.”).

²⁷ For this reason, NAB’s failure to establish the causal link between the transfer and the harm it alleges means it does not have standing to file its Petition to Deny. See, e.g., *Minnesota PCS Limited Partnership, Order*, 17 FCC Rcd 126, 128, ¶6 (Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, 2002).

to recognize that XM could bundle its satellite radio services with any commercial mobile or fixed operator, including a WCS operator, regardless of whether XM is the licensee of those frequencies. In fact, Sprint recently announced that it would offer Sirius programming over its wireless network.²⁸ There is nothing unique about XM's proposed use of WCS frequencies that warrants it to be treated differently than other licensees. Indeed, companies such as Cingular, CrownCastle, Motorola, Qualcomm, Sprint, Verizon Wireless, and countless other operators in both licensed and unlicensed frequency bands are all already providing or in the process of developing services similar to those XM is contemplating.

At bottom, NAB's Petition is yet another transparent attempt to cripple the development of a nascent industry that it thinks might compete with its members. As NAB should know by now, the Commission's policy is to promote competition and not protect competitors.²⁹ The Commission and courts have continually rejected protectionist policies, including protection of broadcasters.³⁰ The emergence of new subscription mobile multimedia services can only serve to benefit consumers by providing more choice in entertainment services and motivating

²⁸ See *Sirius to Offer Streaming Audio to Sprint PCS*, RCR Wireless (June 20, 2005), at 3.

²⁹ See *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, 12 FCC Rcd 5754, ¶ 9 (March 3, 1997). Federal antitrust laws have the same intent. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 US 209, 224 (1993).

³⁰ See *Policies Regarding the Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, Report and Order, 3 FCC Rcd 638, 640 (1988) (rejecting *Carroll* doctrine, which permitted broadcast stations to oppose the licensing of new stations based on potential economic injury, because the policy provided "existing licensees with an anticompetitive tool to delay the entry of new stations"); *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984) (holding that the Communications Act "does not entrench any particular system of broadcasting: existing systems, like existing licensees, have no entitlement that permits them to deflect competitive pressure from innovative and effective technology").

broadcasters to provide new and better services, including expediting the deployment of digital radio.³¹

The Bureau also should reject NAB's request for conditions on XM's WCS licenses. *See* NAB Petition at 13-19. The Commission has repeatedly held that it will use its public interest authority to impose only narrowly tailored, transaction-specific conditions intended to address transaction-specific harms.³² The Commission has explained that it will not use its authority to address alleged harms that would arise even in the absence of the proposed transaction.³³ The harms that NAB alleges will result from the proposed merger, though unlikely to occur in any event, could arise even in the absence of the proposed transfer, in light of the abundance of potential providers of subscription multimedia services.

Moreover, the Commission in adopting service rules for WCS has already adopted two restrictions on WCS licensees that protect broadcasters. First, the Commission's policies preclude WCS licensees from providing terrestrial "broadcasting" service using WCS frequencies. *See WCS Order* n. 70. Second, to the extent WCS licensees use their WCS frequencies to operate an SDARS system (which XM is not proposing to do at this time), they

³¹ *See Section 257 Triennial Report to Congress, Report*, 19 FCC Rcd 3034, ¶ 119 (February 12, 2004) ("The transition to digital audio broadcasting promises the benefits that have generally accompanied digitalization — better audio fidelity, more robust transmission systems, and the possibility of new auxiliary services. Small broadcasters stand to benefit from this development that brings new competitive opportunities to offer enhanced broadcasting sound quality and a range of new supplementary programming services."); *Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service, First Report and Order*, 17 FCC Rcd 19990, ¶ 36 (October 11, 2002) ("Entirely new auxiliary services may also be possible— for example, multiple audio programming channels, audio-on-demand services, and interactive features.").

³² *See, e.g., Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations*, FCC 05-148, at ¶ 23, WT Docket 05-63 (2005); *Cingular-AT&T Wireless Order*, 19 FCC Rcd 21522, at ¶ 43 (2004).

³³ *Cingular-AT&T Wireless Order*, 19 FCC Rcd 21522, at ¶ 43 ("Thus, we do not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.").

would be subject to the Commission's rules governing SDARS, including presumably any restrictions on repeaters.³⁴

In interpreting these restrictions, NAB seems to misunderstand the important legal distinctions between “broadcasting” and wireless subscription multimedia service. For nearly twenty years, court and Commission precedent has clearly established that an essential element of a broadcast service is that it be free to all users; subscription-based services are not “broadcasting” services.³⁵ Indeed, the Commission in adopting rules for SDARS provided the SDARS operators with the choice of offering a broadcast or a subscription-based service, demonstrating that the two types of service offerings are mutually exclusive categories.³⁶ Thus, subscription-based multimedia services are entirely permissible in the WCS band and other

³⁴ See 47 C.F.R. § 27.2(c); *see also XM Radio, Inc., Application for Special Temporary Authority to Operate Satellite Digital Audio Radio Service Complementary Terrestrial Repeaters, Order and Authorization*, DA 01-2172, ¶ 18(c) (September 17, 2001) (“SDARS repeaters are restricted to the simultaneous retransmission of the complete programming, and only that programming, transmitted by the satellite directly to SDARS subscriber’s receivers.”).

³⁵ See *Subscription Video Order*, 2 F.C.C.R. 1001, ¶ 27 (1987), *aff’d*, *Nat’l Ass’n For Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988) (explaining that “a necessary condition for the classification of a service as Broadcasting is that the licensee’s programming is available to all members of the public, without any special arrangements or equipment” and that “where a licensee embarks on a communications service in a manner which permits receipt of that service only by certain members of the public, that licensee is not broadcasting”); *see also Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees, Report and Order*, 16 FCC Rcd 19042, 19053-54 & n. 60 (2001) (holding that subscription television provided by non-commercial educational television stations on their excess digital spectrum does not constitute “broadcasting” and, therefore, Section 399B of the Communications Act, which restricts advertising by NCE licensees, does not apply to nonbroadcast services such as a subscription service); *MCI Telecommunications Corporation, Memorandum Opinion and Order*, 14 FCC Rcd 11077, ¶ 12 (1999) (noting that in the *Subscription Video Order*, the FCC determined that subscription video is not “Broadcasting” as that term is used in the Communications Act).

³⁶ See *SDARS Report and Order*, 12 FCC Rcd 5754, ¶ 84; *American Mobile Radio Corporation, Order and Authorization*, 13 FCC Rcd. 8829, ¶¶ 23-24 (1997).

frequency bands with a Mobile or Fixed allocation.³⁷ A decision in this proceeding to restrict WCS licensees from providing subscription multimedia services would have far-reaching implications, not just for WCS licensees but for operators already offering or planning to offer subscription multimedia services in bands where there is no broadcast allocation, including the Personal Communications Services (“PCS”), cellular, Advanced Wireless Services (“AWS”), 1670-1675 MHz band, and the Broadband Radio Service (“BRS”) bands.

NAB also seems to contend that any service XM provides in the WCS band is subject to limits that apply in the SDARS band. *See* NAB Petition at 17. In fact, despite the fact that satellite DARS is permitted in the WCS band, it does not appear practical at least at this time due to the significant additional steps that would need to be taken before such a service could be offered, such as acquiring licenses to use WCS spectrum in additional markets, obtaining orbital locations, coordinating frequencies internationally, and obtaining Commission space station licenses, among other things. Instead, XM proposes to provide a subscription mobile multimedia service, which does not require the operation of a satellite and is not subject to limitations that may apply to SDARS repeaters. As much as NAB may want to insist that the services XM offers in the WCS band are SDARS, that is not sufficient to make it so. The rules clearly provide for WCS licensees to offer services other than SDARS.

The Communications Act and Commission policies encourage operators to offer new services and to enter new markets without imposing unique regulations tied to the entrant’s traditional business.³⁸ The Communications Act and Commission precedent also recognize that

³⁷ *See Subscription Video Order* ¶ 39 (noting that “MDS operators will provide a subscription service in keeping with the ‘Fixed’ or point-to-point nature of the service.”).

³⁸ *See, e.g.,* Telecommunications Act of 1996, §202(h) (“The Commission shall review ... all of its ownership rules biennially ... and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any

once an entity enters a new market, it may be providing two services subject to two different regulatory regimes. A cable operator is regulated under Title VI of the Communications Act to the extent it offers a “cable service,” but it is virtually unregulated to the extent it offers an “information” service, such as broadband Internet access via cable modem technology.³⁹ A phone company is regulated under Title II of the Communications Act to the extent it offers a “telecommunications service,” but it is virtually unregulated to the extent it offers an “information” service, such as broadband Internet access via Digital Subscriber Line technology.⁴⁰ NAB should understand this. When the Commission was considering whether to

regulation it determines to be no longer in the public interest.”); *Auction of Direct Broadcast Satellite Licenses*, FCC 04-271 (December 3, 2004), at ¶ 43 (rejecting DBS-cable cross-ownership restriction given absence of evidence that such cross-ownership would negatively affect competition or provision of video distribution service); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 15 FCC Rcd 11857 (June 27, 2000), at ¶ 25 (allowing LMDS eligibility restriction to sunset given competitive nature of the broadband services market). As former Commissioner Harold Furchtgott-Roth explained, “The Telecommunications Act of 1996 was a statement that the old way of regulating was no longer useful, if it ever was. Gone were the line-of-business restrictions. No longer could the government tell you or anyone else what line of business it is permitted to offer, or what line of business is off limits.” See Statement of Harold Furchtgott-Roth, Commissioner, Federal Communications Commission before the American Public Communications Council, April 29, 1998, Las Vegas, Nevada; see also Comments of NAB, MB Docket No. 02-277 et al (January 2, 2003), at 64 (comparing newspaper/broadcast cross-ownership prohibition to a “glacial remnant of a regulatory ice age”).

³⁹ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185; CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002), *aff'd in part, vacated in part, and remanded*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd and remanded*, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, Case No. 04-277 (2005).

⁴⁰ See *News Release, FCC Eliminates Mandated Sharing Requirement on Incumbents' Wireline Broadband Internet Access Services* (August 5, 2005) (announcing Commission decision to classify wireline broadband Internet access services as information services) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260433A1.doc).

regulate broadcasters using their digital television capacity to offer ancillary and supplementary services, including subscription-based services, NAB successfully urged the Commission to refrain from imposing broadcast-type regulations.⁴¹ To the extent NAB is suggesting that XM should be prohibited from providing certain services because it is also an SDARS operator, this argument at its base is a request to impose a line-of-business restriction on XM. The Commission has refrained from using this tool except in rare cases where it was necessary to prevent a dominant provider from impeding potential competition.⁴² In no case has the Commission ever imposed a line-of-business restriction to protect a dominant industry such as terrestrial radio from what the dominant industry perceives to be a potential competitor.

Finally, before the Commission can even consider imposing restrictions on use of WCS frequencies, it must have some factual basis for doing so. In this case, NAB has utterly failed to

⁴¹ See Comments of NAB et al, MM Docket No. 87-268 (November 20, 1995) at 22-23 (“The ATV bitstream will provide many new opportunities to add value to television broadcasts and otherwise serve the public. It is too early to say what these uses will be, how remunerative they will be, and far too early for the Commission to set about constricting their development. Instead, the Commission should permit such services to begin to develop and watch to see the choices the market supports Broadcasters oppose limitations on the provision of ancillary and supplementary services”). *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order*, 12 FCC Rcd 12809, ¶¶ 29-30 (April 21, 1997). (“Ancillary and supplementary services could include, but are not limited to, subscription television programming, computer software distribution, data transmissions, teletext, interactive services, audio signals, and any other services that do not interfere with the required free service. . . . In addition, we will not impose a requirement that the ancillary and supplementary services provided by the broadcaster must be broadcast-related.”).

⁴² For example, the Commission established the Multichannel Video Distribution and Data Service (“MVDDS”) to create another potential competitor in the multi-channel video programming distributor (“MVPD”) market. The Commission prohibited cable operators from holding MVDDS licenses that overlapped with their cable service area, finding that “open eligibility for in-region cable operators [would] pose[] a significant likelihood of substantial competitive harm” because “cable operators have a strong incentive to prevent entry by new MVPD providers.” See *Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, Second Report and Order, Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614, ¶ 164 (2002).

provide any evidence that subscription mobile multimedia services are threatening the viability of local broadcasters or will threaten their viability after XM acquires WCS licenses. Whereas XM has 4.4 million subscribers today, virtually every car and home in United States has at least one AM/FM radio, adding up to well over 800 million radios capable of receiving the product of NAB members.⁴³ While XM and other new and potential providers of subscription mobile multimedia services had to pay for their licenses at auction, most terrestrial broadcasters received their licenses, including the right to broadcast digitally, for free. The subscription mobile multimedia services marketplace is still a nascent industry and faces significant hurdles that terrestrial broadcasters do not. In any event, a transfer application is not the appropriate forum for considering the line of business restrictions NAB now advocates.

C. WCA's Claims Are Not Germane to the Transfer Application

In its Petition, WCS does not oppose the transfer of WCS Wireless' licenses to XM, which is the only issue before the Bureau in this proceeding.⁴⁴ Rather, WCA claims that XM will need to make its own case for a waiver of the Commission's peak power specification for

⁴³ See *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, Further Notice of Proposed Rulemaking*, MM Docket No. 99-325, FCC 04-99 (April 20, 2004), at ¶ 11 ("Currently, 108 million U.S. households, or 98% of all U.S. households, have a radio device. We estimate that there are, on average, 5 radios per household or about 500 million receivers. We also estimate that by the end of 2003, there were about 225 million motor vehicles on the road with radios. There are also millions of radios in use in other vehicles, such as commercial trucks and watercraft, as well as commercial establishments such as restaurants and hotels. All in all, we estimate that there are nearly 800 million radio sets in use in the United States."). In comparing terrestrial and satellite radio, Bob Neil, President and CEO of terrestrial radio broadcaster Cox Radio, Inc., likened satellite radio "more to a zygote than to an embryo. . . . The bottom line: Satellite radio's impact on traditional radio is minimal." Bob Neil, Editorial, *Satellite Radio: Too Early to Pass Out the Cigars*, Wall St. J., Apr. 11, 2005, at A23.

⁴⁴ WCA accordingly lacks standing to file its Petition to Deny because it has failed to allege any harm that will result from the transfer. See, e.g., *Minnesota PCS Limited Partnership, Order*, 17 FCC Rcd 126, 128, ¶6 (Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, 2002).

WCS base stations.⁴⁵ WCA has already made this claim in the pending waiver proceeding.⁴⁶

The fact that XM rather than WCS Wireless will operate base stations at an average power specification is not of decisional significance in the waiver proceeding. To the extent that WCA is operating under the mistaken belief that XM is proposing to operate its WCS transmitters at identical power levels to its SDARS repeaters, that is not the case. XM is not proposing to operate any of its WCS transmitters at more than 2 kW average EIRP. WCS Wireless has already demonstrated that WCS facilities operating at an average rather than a peak power specification are crucial for an efficient datacasting service and will not result in increased interference to other services. Tellingly, WCA does not offer any reason why XM's proposed operation of base stations at an average power specification should be treated any differently than WCS Wireless' proposed operation, nor does WCA explain the benefit of seeking further process on the waiver request to reflect the transfer of the licenses to XM.

II. THE APPLICATION IS COMPLETE AND THE BUREAU HAS AMPLE AUTHORITY TO GRANT IT

Petitioners raise a number of unavailing claims as to the sufficiency of the information provided in the application and the Bureau's authority to act on the application.⁴⁷ While NAB and Sirius ask the Bureau to require the Applicants to submit additional information, neither has demonstrated that the Applicants have failed to submit information required by the

⁴⁵ WCA's Petition should be denied because it fails to demonstrate or even allege how grant of the transfer application – as opposed to the pending waiver application – “would be inconsistent with the public interest, convenience and necessity,” as required by the Communications Act and the Commission's rules. *See* 47 U.S.C. § 309(d); 47 C.F.R. § 1.939(d).

⁴⁶ *See* Wireless Communications Association International, Inc., Reply, DA 05-1662 (July 15, 2005).

⁴⁷ As an initial matter, the Sirius and WCA Petitions should be denied because they failed to include an affidavit supporting their allegations of fact. *See* 47 C.F.R. § 1.939(d); *compare* NAB Petition, Declaration of Marsha J. MacBride.

Commission's rules. *See* NAB Petition at 8-11; Sirius Petition at 8. Moreover, while Sirius asks the Bureau to require XM to provide technical information with respect to its proposed WCS deployment, WCS licensees are not required to disclose this information. Sirius offers no basis for requiring XM to disclose information regarding its WCS deployment when WCS Wireless and every other WCS licensee are not subject to such a disclosure requirement.

NAB is also wrong in its challenge to the Bureau's authority. *See* NAB Petition at 11-14. This application does not present any "new or novel questions of law or policy which cannot be resolved under outstanding Commission precedents and guidelines." 47 C.F.R. § 0.331(a). This proceeding involves a simple transfer of control application that does not require a waiver of any Commission rules. XM is proposing to operate WCS facilities pursuant to the Commission's long-established rules governing WCS, just as WCS Wireless and any other WCS licensee could do. Dozens of WCS licenses have been transferred since the licenses were originally granted in 1997, none of which were opposed by any of the Petitioners.

The claims of NAB and Sirius that grant of the transfer application should be delayed because it will unfairly prejudice the outcome of the SDARS repeater rulemaking is wrong both as a matter of policy and law. *See* NAB Petition at 12; Sirius Petition at 7. The fact is that approval of the transfer application can only expedite resolution of the SDARS repeater negotiations. As a licensee of both WCS and SDARS spectrum, XM will be uniquely interested in ensuring a fair, equitable, and expeditious resolution of the repeater negotiations.⁴⁸ In any

⁴⁸ Sirius claims that XM would be able to obtain commercially sensitive information regarding Sirius's proposed repeater deployments. *See* Sirius Petition at 7 n.20. In fact, XM and Sirius already routinely provide this information to one another to assess and manage any potential for interference from their respective repeater networks. Sirius also claims that the Commission has noted the "dangers" of affiliated parties being on both sides of a negotiation. *See* Sirius Petition at 7 n.21. The only case Sirius can cite to support this claim has no relevance to the dynamics of the repeater negotiations; the case pertains to the ability and incentive of a local phone company

event, as a matter of law, the Commission is not obligated to delay the grant of a transfer application due to the pendency of an arguably related proceeding.⁴⁹

Contrary to WCA's assertion, the Bureau provided sufficient notice that transfer of WCS Wireless' licenses to XM also includes transfer of the pending waiver application. *See* WCA Petition at 3. Indeed, the sufficiency of the notice is demonstrated by the fact that WCA readily admits that it received notice that transfer of the licenses includes transfer of the pending waiver application. *See id.* at 3. In any event, the Bureau has held that Public Notice of an application to transfer control of wireless licenses is sufficient notice to the public with respect to any pending matters involving those licenses, including the transfer of any pending applications relating to those licenses.⁵⁰ WCA claims that the applicants did not indicate that they were requesting a waiver, but the fact is that the Application itself does not contain any waiver requests, buried or otherwise. *See* WCA Petition at 3. Rather, in the Application, the applicants merely requested recognition that they are entitled to an exemption from the Commission's rules regarding major amendments to pending applications, such that the pending waiver application will not be subject to a second public notice after consummation of the transfer. *See* Application, Exhibit 1, Footnote 1. The Bureau has held that after the transfer of control of a wireless

to negotiate an uneconomically high interconnection rate with its mobile affiliate in order to charge consumers supra-competitive rates. *See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Notice of Proposed Rulemaking*, 11 FCC Rcd 5020 (January 11, 1996).

⁴⁹ *See, e.g., General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, Memorandum Opinion and Order*, 19 FCC Rcd 473, ¶ 25 (2004).

⁵⁰ *See Ameritech Corp. and GTE Consumer Services, Inc. for Consent to Transfer of Control of Licenses and Authorizations*, 15 FCC Rcd 6667, at ¶ 2, n.6 (Wireless Telecommunications Bureau, 1999) ("[T]he public notice announcing GTE's intention to acquire specific Ameritech licenses provided adequate notice to the public with respect to any pending matters involving these licenses.").

licensee is consummated, the transferee may assume control of that licensee's pending applications without separately amending them to reflect the change in the licensee's ownership, or otherwise providing public notice of that change.⁵¹ Since the Applicants qualify for this exemption under established Commission policy, no waiver is required and none was requested in the Application.

Conclusion

For the foregoing reasons, XM urges the Bureau to expeditiously approve the above-referenced transfer of control application.

Respectfully submitted,

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⁵¹ See *Comcast Cellular Holdings and SBC Communications, Inc. for Consent to Transfer of Control of License and Authorizations*, 14 FCC Rcd 10604, at ¶ 2, n.3 (Wireless Telecommunications Bureau, 1999) ("We do not believe, however, that a waiver of the rules is necessary in this situation because we do not believe amendments must be filed with respect to any such pending applications for the transfer of control to SBC to be reflected in the application."); *Ameritech Corp.*, 15 FCC Rcd 6667, at ¶ 2, n.6.

Technical Appendix

Technical Analysis of Intermodulation Interference

•Overview

- Intermodulation interference (IM) is a product of two or more signals interacting in a receiver that generate additional frequencies components that may cause interference.

- This analysis was limited to third-order Intermodulation (IM3). The following calculation was used:

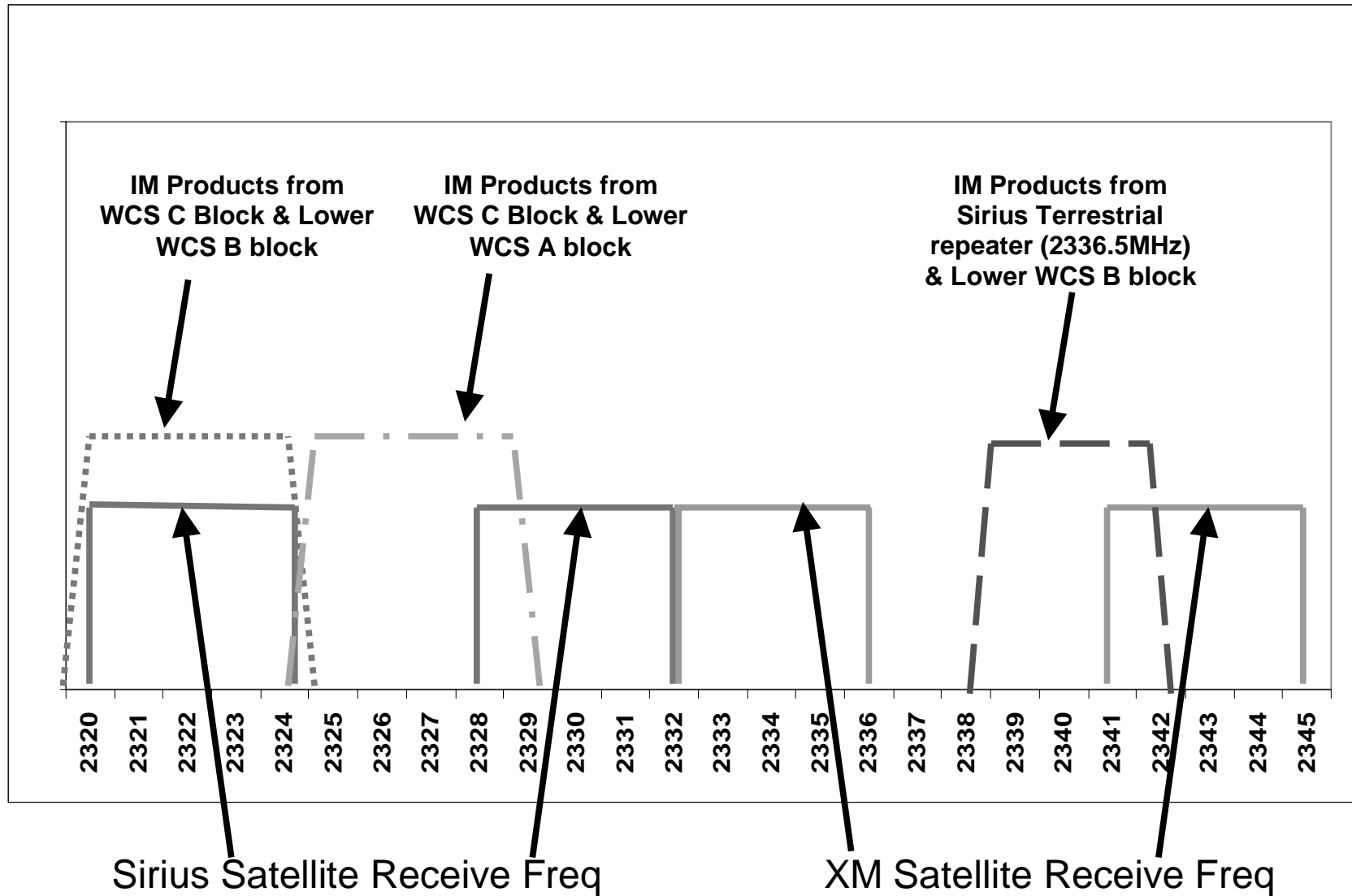
- For two frequencies F_a and F_b , the IM3 products are equal to $2 \cdot F_a - F_b$ and $2 \cdot F_b - F_a$.

•Results

- The results in the following chart show examples of IM3 products that can be calculated to fall in the XM Satellite band and the Sirius Satellite band in the absence of XM terrestrial signals.

- This is not an exhaustive analysis but clearly shows that IM3 must be considered as a potential interference source currently.

Intermodulation Products in SDARS Satellite band



Technical Certification

I, Craig Wadin, an engineer employed by XM Radio Inc., certify under penalty of perjury that:

I am the technically qualified person with overall responsibility for the technical information contained in this Opposition. I am familiar with the Commission's rules, and the information contained in the Opposition is true and correct to the best of my knowledge and belief.

/s/Craig Wadin
Craig Wadin

Dated: August 17, 2005

Declaration of William J. Bailey

1. I am the Senior Vice President, Regulatory and Government Affairs, of XM Satellite Radio Holdings Inc.
2. I have read the foregoing Opposition to the Petitions to Deny the application to transfer certain Wireless Communications Service ("WCS") licenses from WCS Wireless, Inc. to XM Satellite Radio Holdings Inc.
3. I have personal knowledge of the facts stated in the Opposition. The facts set forth in the Opposition, other than those of which official notice may be taken, are true and correct to the best of my knowledge, information, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

/s/William J. Bailey
William J. Bailey

Executed on August 17, 2005

Certificate of Service

I, Sylvia A. Davis, a secretary with the law firm of Pillsbury Winthrop Shaw Pittman LLP, hereby certify that on this 17th day of August 2005, served a true copy of the foregoing by first-class United States mail, postage prepaid, upon the following:

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